IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 639

FORREST L. MOE and EDITH B. MOE, *Petitioners,*

v.

HUGH H. EARLE, Former Collector of Internal Revenue at Portland, Oregon

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The respondent states (Brief, p. 12) that—"Neither petitioners nor the Government support the rationale of the decision of the Court of Appeals". However, respondent would have the petition denied on the grounds—

(1) That there was no finding below that petitioners' share of the cooperative building and equipment fund, accumulated by charges against the proceeds of fruit sold for petitioners from 1930 to 1937,

was created *pursuant to a pre-existing obligation,* and that the existence of such obligation was dubious (Brief, pp. 10, 11, 12, 13); and

(2) That the complicated problems of the relationship between marketing cooperatives and their patrons have been under administrative and legislative study since 1947 and should remain there (Brief, pp. 13, 14)

I

The respondent admits that in both of the courts below the parties assumed that the charges against the proceeds of petitioners' fruit for the purpose of adding to the building and equipment fund of the cooperative were sanctioned by a pre-existing obligation, which was binding upon petitioners and their cooperative. The suggestion that this may not be so, first advanced at this time, comes too late as an obvious afterthought. Furthermore, the facts as found clearly show that the dealings between the petitioners and the cooperative, which laid the foundations for this action, were the result of prior contractual rights and obligations.

There were *two* pre-existing obligations. The first was the obligation of the cooperative to account to its patrons for the proceeds, over and above marketing costs, of all fruit sold for them. This obligation appears in the Standard Co-Operative Growers Contract, signed by petitioners and the cooperative, in 1929. (Plaintiffs' Exhibit 2, R. 47, admitted in evidence R. 83, Finding V, R. 55-56, reprinted in full as Appendix D to the Petition, pp. 5a-7a). This stated,

with respect to the disposition of the proceeds of fruit sold for the growers:

> "The Association agrees to handle and market the Grower's fruit with due diligence; and to pay the Grower such advances from time to time as sales warrant and to pay the balance of the net proceeds obtained by it for the fruit within thirty days after the receipt of the money for each pool of fruit; it being agreed by the parties that all fruit delivered hereunder shall be pooled by the Association with other fruit delivered under similar contracts, according to size, tier, grade, variety and time of delivery, and that the proceeds of each pool shall be distributed by the Association pro rata among the growers having fruit in such pool."

The second obligation was that of petitioners to contribute capital to the cooperative for the purposes of its building and equipment fund, established by a by-law of April 3, 1920, which read in part as follows (Finding VIII, R. 56, 57):

> "Said fund so created, shall be known as the 'Building and Equipment Fund,' and shall be kept separate and apart from all other funds and moneys of the Association and shall be used exclusively for the purchasing of or paying for property, equipment or betterments, for the benefit of the Members of the Association in handling and marketing their fruit, and no portion of said fund shall be paid out in any other manner or for any other purpose than as stated herein."

Sums owing by the cooperative to petitioners under the Standard Co-Operative Growers Contract were set off at the end of each year against assessments for the building and equipment fund and petitioners were

duly advised of the amounts retained as well as those refunded in cash. (Findings X, XI, R. 58-60). No clearer case of actions taken pursuant to contracts could be found. Such actions were in accord with ordinary cooperative practices.

Prior to 1940 the additions to the building and equipment fund of the cooperative constituted its permanent capital, not subject to repayment except on dissolution. Beginning in 1940, an amendment to the by-laws placed this fund upon a revolving basis, the earliest contributions to it to be repaid out of the latest assessments against the patrons. (Finding XII, R. 60-65). Certificates evidencing past contributions to this revolving fund were issued to petitioners in 1942 (Finding XIII, R. 65) and these certificates were redeemed in 1949 and 1951. (Findings XIV, XV, XX and XXI, R. 65, 66, 68, 69). The by-laws of 1940, and the certificates of contribution to the revolving capital fund which petitioners received pursuant to it, made no difference in their status as owners of a portion of the cooperative capital. The new by-law and the certificates merely indicated an intention on the part of the cooperative to retire capital contributions, in the order made, as soon as feasible and prior to dissolution.

This objection raised by respondent for the first time is without substance.

II

The suggestion by respondent that Congress and the Executive should be left free to solve this and other problems affecting the taxation of farmer cooperatives and their patrons in effect asks this Court to abdicate

its judicial function in this matter. The questions here presented, dealing with the taxation of patrons of farmer cooperatives, have never been the subject of direct legislation and there is no guarantee that they ever will be. In the meantime, hundreds of thousands of farmers are caught between conflicting views, not two but three, of the Treasury Department and the Courts of Appeal for the 5th and 9th Circuits and the Tax Court. See the discussion in the petition for certiorari, pp. 19-22. Neither they nor their advisors can know with any certainty what course they should follow in reporting the result of their dealings with their cooperatives. The problems of this large group of taxpayers, who are now thoroughly confused, make this case one of public importance, which can and should be decided by this Court.

Respectfully submitted,

WILLIAM E. DOUGHERTY
Counsel for Petitioners,
811 Equitable Bldg.
Portland 4, Oregon